Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

77-429

LAWRENCE R. FRY & NELLIE R. FRY,
Husband & Wife,

Petitioners,

v.

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

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September 14, 1977

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

The Petitioners, LAWRENCE F. FRY and NELLIE R. FRY, husband and wife, pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, rendered in these proceedings on June 22, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, 557 F.2d 646, appears at Appendix A. The opinion of the United States District Court, Eastern District of Washington, is unreported, and appears at Appendix B. The United States Court of Appeals for the Ninth Circuit affirms the opinion of the United States District Court, Eastern District of Washington.

JURISDICTION

The order or judgment of the United States Court of Appeals for the Ninth Circuit was rendered and entered on June 22, 1977. This petition for certiorari was filed less than 90 days from the date aforesaid.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Is income derived from logging of standing timber off of unallotted tribal lands by an unenrolled, non-competent member of the Confederated Tribes of the Colville Reservation, in the State of Washington, subject to federal income tax and old age, survivors, and disability insurance tax (self-employment tax), under the Sixteenth Amendment to the United States Constitution?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment XVI:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived,

without apportionment among the several States, and without regard to any census or enumeration ."

26 U.S.C. 61:

"(a) General Definition. - Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: . . ."

26 U.S.C. 1401:

"(a) Old-Age, Survivors, and Disability Insurance. - In addition to the other taxes, though there shall be imposed for each taxable year, on the self-employment income of every individual, a tax as follows:

(1) In the case of any taxable year beginning after December 31, 1965 and before January 1, 1967, the tax shall be equal to 5.8% of the amount of the self-employment income for such taxable year; . . ."

STATEMENT OF FACTS

The facts relevant to the question presented by this petition are uncon-

troverted and therefore may be introduced to the Court in the summary fashion.

Petitioners are husband and wife and are both noncompetent enrolled members of the Confederated Tribes of the Colville Reservation and live on the reservation. For the tax years 1962 through 1966, inclusive, Petitioners paid $21,498.62 in federal income tax, self-employment tax and interest accrued thereon.

Petitioners' sole source of income for the tax years in question was from contract logging and standing timber on unallotted tribal land owned by the Confederated Tribes of the Colville Reservation. The contracts let out to log this land were to non-Indian contractors and Petitioners' acted as a subcontractor in

performing the actual logging. Petitioner predominately utilized other members of the Confederated Tribes of the Colville Reservation on conducting his logging operation.

BASIS FOR JURISDICTION BELOW

Petitioner had proper jurisdiction with the District Court of the United States for the Eastern District of Washington under 28 U.S.C. Section 1346(a).

REASONS FOR GRANTING WRIT

The Court has not spoken in the area of the Federal income taxation of Indians since the "Landmark" case of Squire v. Capoeman, 351 U.S.1 (1956). In Capoeman the Court carved out a judicial exemption to the application of the federal income tax laws as they applied to income

realized by noncompetent Indian from the sale of timber off of trust-allotted land. The instant case differs from Capoeman in that the logging activity conducted by the Petitioner was from unallotted tribal land.

A good deal of confusion and resulting litigation has marked the era since the decision in the Capoeman case. It is obvious that substantial numbers of people are effected by these decisions - i.e., the many thousands of individuals in the United States who maintain their heritage as American Indians. Defining the rights of these peoples as they concern the taxing power of the federal government is of extreme national importance.

The state of the law is now one of confusion and inequity. If the

Petitioner in the instant case had logged allotted land acquired by him either through gift, inheritance, or purchase, he would have been clearly exempt from the payment of federal income tax on his logging income. (See Stevens v. C.I.R., 452 F.2d 741 (9th Cir. 1971). Such a result is not only inequitable but inexplicable on any kind of meaningful basis.

In the instant case the United States Court of Appeals for the Ninth Circuit found that to accept the argument of Petitioner would amount to judicial legislation. The court ignored the fact that the entire area of federal taxation of Indians is a history of judicially made exemption and the revocation of such exemptions, without any apparent common thread running through the cases.

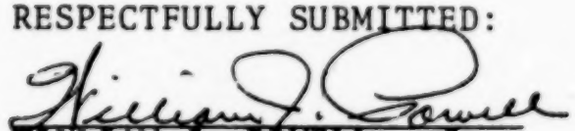
In short, the Court needs to bring clarification to a troublesome area of significant importance.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

(Note: Since preparation of Petition, Petitioners' found Critzer v. U.S., Ct.Cl., (7/12/77) which upholds broad federal income tax exemption for Indians, including timber sales. Reported U.S. Tax Week, 1977, No. 36, p.1063).

RESPECTFULLY SUBMITTED:



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APPENDIX A

Here is set forth the opinion rendered in the United States Court of Appeals for the Ninth Circuit.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE R. FRY & NELLIE R. FRY, husband & wife,)NO. 76-1779

Plaintiffs-Appellants,)OPINION

vs.)

UNITED STATES OF AMERICA)

Defendant-Appellee.)

_____)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

Before: CHAMBERS and CHOY, Circuit Judges, and BONSAL, * District Judge

CHOY, Circuit Judge:

Appellants, Lawrence and Nellie Fry, are members of the Confederated Tribes of the Colville Reservation (the Tribe). They appeal from a judgment of the district court holding that their income derived from logging operations on Reservation land is not exempt

from federal income taxation. We Affirm.

Kettle Falls Lumber Company, a non-Indian concern, contracted with the Tribe to cut timber from unallotted lands of the Reservation.[1] Lawrence Fry, in turn, was hired by Kettle Falls as a logging subcontractor, but Fry himself had no direct contractual relationship with the Tribe. The majority of Fry's employees were Indians. Fry and his wife paid income taxes on the income derived from this logging operation and then sued for a refund.[2] The district court granted the Commissioner's motion for summary judgment. This appeal followed.

At the outset, appellants concede

*Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

that the general rule is that Indians, like other United States citizens, are subject to federal income taxation unless exempted by treaty or statute.[3] Squire v. Capoeman, 351 U.S. 1, 6 (1956). In Squire, the Supreme Court found such an exemption in Sections 5 and 6 of the General Allotment Act of 1887 (the Act), 25 U.S.C. Section 348 and 349, as amended. It is held that, because the Act "evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee," 351 U.S. at 8, and because "'the exemption according tribal and restricted lands extends to the income derived directly therefrom'," id. at 9, quoting F. Cohen, Handbook of Federal Indian Law 265 (1940), the income realized by a non-competent Indian allottee from the sale

of timber taken from his trust-allotted land was exempt from federal capital gains tax. See 351 U.S. at 9-10 & n.19.[4/]

In Stevens v. C.I.R., 452 F.2d 741 (9th Cir. 1971), we had occasion to construe the meaning and scope of the Squire exemption. There, we held that income directly derived by a noncompetent Indian allottee from farming and ranching operations on his allotted lands was exempt from federal income taxation regardless of whether he acquired the land as part of an original allotment, by gift from an original allottee, or by purchase from an original allottee or the estate thereof. See 452 F.2d at 746, 749. We did so on the basis that the same exemption found in the Act and construed by the Supreme Court in Squire covered Stevens' tribe; that

it protected ordinary income as well as capital gains; and that it applied in spite of the fact that the land from which Stevens' income directly derived was not acquired by him through original allotment. See 452 F.2d at 744-49. See also Kirkwood v. Arenas, 243 F.2d 863 (9th Cir. 1957); United States v. Daney, 370 F.2d 791 (10th Cir. 1966); United States v. Hallman, 304 F.2d 620 (10th Cir. 1962); Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1962); Asenap V. United States, 283 F. Supp. 566, 573 (W.D. Okl1 1968); Nash v. Wiseman, 227 F. Supp. 552, 553-55 (W.D. Okl. 1963). But compare Bird Bear v. McClean County, 513 F.2d 190, 193 (8th Cir. 1975); Quinault Allottee Ass'n v. United States, 485 F.2d 1391-1400 (Ct. Cl. 1973), cert. denied, 416 U.S. 961 (1974).[5/]

Appellants acknowledge that, since allotted lands are not here at issue, the exemption construed in Squire and Stevens does not, by its terms, apply. They also admit their inability to cite a statutory or treaty exemption which does specifically apply to them or their activities. Nevertheless, they still seek an exemption, basing their argument on an analogy to Squire and Stevens. Basically, appellants maintain that, since the income which the Tribe itself directly derives from the logging operations on tax-exempt land is exempt from federal income taxation, their income too should be shielded. This argument is without merit.

First, appellants here fail to point to any treaty or statute which, in the first instance, exempts the tribal lands from federal taxation. Second, even if we assume that the Reservation lands

concerned are tax-exempt[6/] appellants cannot show that their income derives "directly" from those lands. While the Tribe's income from appellants' logging operations may indeed be said to derive directly from its ownership of the unallotted Reservation lands, appellants' income derives from a contract entered into between them and Kettle Falls, whose income in turn derives from a contract between it and the Tribe.[7/]

In both Squire and Stevens, the income which was held to be exempt to the allottee was from operations conducted on his own allotted land. Indeed, in Stevens, the Tax Court had held taxable income derived from the ranching and farming of land which was leased from other allottees by Stevens, and he did not appeal that ruling. See 452 F.2d

at 743. We, therefore, were concerned only with income directly derived from land which was held by the taxpayer, though acquired other than by original allotment. The Eighth Circuit, however, has held that, even if income derived from tribal land may be tax-exempt to the tribe itself, the income which a noncompetent Indian derives from cattle operations conducted on such lands pursuant to a grazing permit from the tribe is not tax exempt. Holt v. C.I.R., 364 F.2d 38, 41 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967). See also, Strom v. C.I.R., 158 F.2d 520 (9th Cir. 1947), aff'g 6 T.C. 621 (1946).

Appellants, however, are not to be deterred. Recognizing that the link between their income and tax-exempt Indian land is probably too tenuous to meet the test of precedent in this area,

they advance to bold variant on their basic argument. They suggest that we read Squire and Stevens, not as turning on the construction of a statutory exemption, but rather as standing for the broader proposition that income derived by an Indian from activities which directly benefit other Indians is tax-exempt. They bring their own case within such a rule by pointing both to the benefit which the Tribe obtains in having its timber logged and to that which their Indian employees enjoy through employment.

It is true that both Squire and Stevens contain language to the effect that ambiguities in treaties and statutes are to be resolved in favor of Indians. See, 351 U.S. at 6-7; 452 F.2d at 744. But it is one thing to say that courts should construe treaties and statutes dealing with Indians

liberally, and quite another to say that, based on those same policy considerations which promoted the canon of liberal construction, courts themselves are free to create favorable rules. See, Holt, supra, at 40. Cf. Wells Fargo & Co. v. Wells Fargo Exp. Co., No. 74-2109 (9th Cir. April 22, 1977)(slip opinion at 775-76). We have previously refused to accept such an argument in this context, pointing out that Congress is the body which grants tax exemptions. See, C.I.R, v. Walker, 326 F.2d 261, 264 (9th Cir. 1964).[8/] And,

> " (the Supreme) Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affect-Indians as to all others. . . .

Mescalero Apache Tribe v. Jones, 411 U. S. 145, 156 (1973), quoting Oklahoma

Tax Comm'n v. United States, 319 U.S. 598, 606-07 (1943). Accord, Agua Caliente Band of Mission Ind. v. County of Riverside, 442 F.2d 1184, 1187 & n.15 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972).

The exemption construed in Squire and Stevens was intended to provide the allottee with unencumbered land when he became competent. See Squire, 351 U.S. at 9-10 & n.19. It was not to benefit him simply because he was an Indian,[9/] or to benefit Indians generally.[10/] Moreover, the efforts of the taxpayer in C.I.R. v. Walker, 326 F.2d 261 (9th Cir. 1964), who served as Treasurer for his Indian community, surely benefited Indians more clearly and directly than did appellants' logging operations, yet we found Walker's

salary to be subject to federal income taxation.

Appellants can point to no treaty or act of Congress that grants an exemption which is applicable to their case. Accordingly, the general rule of taxability controls, and the judgment of the district court must be

AFFIRMED.

FOOTNOTES

1. (reference on page 1)

Reservation land is divided into two classes; land allotted to individual Indians for the use and benefit of the allotee; and common tribal land used for the benefit of the entire community . . . .

C.I.R. v. Walker, 326 F.2d 261, 263 (9th Cir. 1964).

2. (reference on page 1)

It appears that Mrs. Fry was not involved in the logging venture which produced the income at issue here. Her status as taxpayer and appellant apparently derives from the fact that, although filing separately during the relevant years, she reported a portion of the subject income on her tax returns.

3. (reference on page 3)

For recent Supreme Court cases which delineate the rules governing state taxation of Indians and their activities, see Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976); McClanaham v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). See also, United States v. Antelope, 45 U.S.L.W. 4361 (U.S. April 19,

1977); Confederated B. & T. of Yakima Indian Nat. v. Washington, 550 F.2d 443 (9th Cir. 1977) (en banc).

4. (reference on page 2)

> A noncompetent Indian is one who holds allotted lands only under a trust patent and may not dispose of his property without the approval of the Secretary of the Interior. It does not denote mental incapacity.

Stevens v. C.I.R., 452 F.2d 741, 742 n. 1 (9th Cir. 1971).

5. (reference on page 3)

> We have been called upon to construe the Act in contexts other than taxation as well. See, e. g., United States v. Southern Pacific Transp. Co., 543 F.2d 676, 694-95 (9th Cir. 1976); Dillon v. Antlear Land Co., 507 F.2d 940 (9th Cir. 1974), cert. denied, 421 U.S. 992 (1975); Akers v. Morton, 499 F.2d 44, 47-48 (9th Cir. 1974), cert. denied, 423 U.S. 831 (1975).

6. (reference on page 4)

Indian tax appellants seem regularly to call upon appellate courts to make this unsupported assumption. See, e.g., C.I.R. v. Walker, 326 F.2d 261, 264, (9th Cir. 1964); Holt v. C. I. R., 364 F.2d 38. 41 (8th Cir. 1966). cert. denied . 386 U.S. 931 (1967). The basis for the instant, assumed exemption for tribal lands was neither briefed nor

discussed at oral argument by the parties.

7. (reference on page 4)

> We are aware that any tax on appellants' income may be said to indirectly tax the Tribe itself -- depending, of course, on the ability of appellants to shift the burden -- and to that extent undercuts the tribal land's assumed tax exemption. Such a nexus does not meet the requirement that the impact be "direct." Compare Aqua Caliente Band of Mission Ind. v. County of Riverside, 442 F.2d 1184, 1186 (9th cir. 1971), cert. denied, 405 U.S. 933 (1972). Cf. Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418, 421 (1935) (return from reinvestment of exempt income directly derived from exempt land held taxable), discussed in Squire, 351 U.S. at 9.

8. (reference on page 5)

> As appellants assert, a policy argument can be made that noncompetent Indians should be exempt from federal taxation on income derived from services performed on the reservation where they live, for the benefit of the Tribe, notwithstanding that they were paid by an outside contractor. Such policy considerations, however, are matters to be determined by the Congress and not by the Courts.

9. (reference on page 6)

Although the point was not pressed here, it appears that appellants also argued below that it is "unconstitutional" for the Federal Government to tax the income of Indians. Such a contention is, of course, foreclosed by Squire itself. See 351 U.S. at 6. There, the Court emphasized the point:

> The Government also relies upon Choteau v. Burnet, 283 U.S. 691, but that case also is not controlling, since it held only that a competent Indian, who had unrestricted control over lands and income therefrom, was not exempt from income tax solely because of his status as an Indian.

351 U.S. at 9-10 n.19 (emphasis in original). See LaFontaine v. C.I.R., 533 F.2d 382 (8th Cir. 1976).

10 (reference on page 6)

See note 7 supra.

APPENDIX B

Here is set forth the opinion rendered in the United States District Court, Eastern District of Washington.

IN THE UNITED STATES DISTRICT

COURT FOR THE EASTERN

DISTRICT OF WASHINGTON

LAWRENCE F. FRY and NELLIE R. FRY, husband and wife,	)	CIVIL NO. C-74-192
Plaintiffs,	)	JUDGMENT
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

This action having come on for hearing on the defendant's motion for summary, judgment, and the Court having duly considered all the facts, written briefs and oral arguments of counsel for all parties, and the Court having concluded that there is no genuine issue of a material fact, and that the defendant is entitled to judgment as a matter of law,

IT IS HEREBY ORDERED that the

plaintiffs' complaint be dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

January 28, 1976
DATE

Entered in Civil Docket on 1/29/76

Supreme Court, U. S.
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DEC 2 1977
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

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LAWRENCE R. FRY and NELLIE R. FRY, PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question presented by the petition is whether income derived by petitioners from logging operations is exempt from federal income taxation because petitioners are Indians. Petitioners are enrolled members of the Confederated Tribes of the Colville Reservation and residents of the Reservation. During 1962-1966, petitioner Lawrence R. Fry acted as a subcontractor to a non-Indian contractor performing logging operations on unalloted tribal land in the Reservation (Pet. App. A 11-12).

Petitioners paid $21,498.62 in income taxes, self-employment taxes and interest on the income derived from this logging operation. In this refund suit brought by petitioners in the United States District Court for the Eastern District of Washington, the district court rejected

petitioners' claim to immunity from tax and dismissed the suit (Pet. App. B 28-29). The court of appeals unanimously affirmed (Pet. App. A 11-26).

The court of appeals correctly held that the petitioners' income from their contract logging operation was not exempt from federal income tax under any treaty or statute. As this Court stated in *Squire* v. *Capoeman,* 351 U.S. 1, 6: "* * * Indians are citizens and * * * in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens."

Here, it is undisputed that petitioner derived the income in question from services performed as a subcontractor for a non-Indian contractor in logging operations on tribal land (Pet. 5-6). Whatever the status under applicable treaties and statutes of the profits derived by the tribe from the sale of standing timber on the tribal lands of its reservation (see *Squire* v. *Capoeman, supra,* 351 U.S. at 8-9; *Holt* v. *Commissioner,* 364 F. 2d 38 (C.A. 8), certiorari denied, 386 U.S. 931), petitioners' income was earned under a contract to perform services. *Squire* v. *Capoeman, supra,* 351 U.S. at 4-5, n. 7. Income received by an Indian for the performance of services is subject to federal income tax, even where the services were rendered as an officer of a self-governing Indian community. *Commissioner* v. *Walker,* 326 F. 2d 261 (C.A. 9).

Petitioners point to no statute, no treaty, and no case holding that income derived by an Indian from a contract to perform services is exempt from federal income tax. As the court of appeals observed (Pet. App. A 19-20), their argument appears to be based on an expansion of the doctrine that ambiguities in statutes and treaties dealing with the rights of Indians are to be resolved in favor of the Indians. *Stevens* v. *Commissioner,* 452 F. 2d 741, 744 (C.A. 9). See, *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 655, n. 7. They would read that doctrine as extending a tax exemption to any activity carried out by an Indian even indirectly for the benefit of an Indian tribe or other individual Indians (Pet. App. A 19-20).

But exemptions are not to be granted by implication. Here, no treaty or statute provides a tax exemption for the contract income earned by petitioners. The court of appeals therefore correctly held that the income was subject to tax. *Superintendent* v. *Commissioner,* 295 U.S. 418, 420; *Commissioner* v. *Walker, supra,* 326 F. 2d at 263-264. See *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

DOJ-1977-12